

TIMOTHY A. FRYE
Claimant

INDIAN TRAILS MANOR, INC.,
Respondent

FIREMAN'S FUND INSURANCE COMPANY
Insurance Carrier

ORDER

APPEARANCES

RECORD

ISSUES

The Administrative Law Judge granted claimant's request for benefits. The respondent and insurance carrier request the Appeals Board review the following issues:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment with the respondent on June 10, 1994.
- (2) Whether the Administrative Law Judge abused his discretion in granting temporary total disability benefits.
- (3) Whether the Administrative Law Judge erred by designating an authorized treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing, the Appeals Board finds, as follows:

(1) Claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on June 10, 1994. On that date, while at work, claimant helped a co-worker lift and move a desk weighing seventy-five to one hundred (75-100) pounds. Although claimant did not experience pain when he helped move the desk, he did experience an uncomfortable feeling, took two aspirin, and went about his duties. A short time later, and while still at work, claimant was working on a toilet and experienced severe pain in his back. Claimant reported his back pain to Tonya Williamson, respondent's administrator, and requested medical treatment.

On June 10, 1994, claimant provided histories of a work-related accident to both an emergency room physician and Dr. Glen Bair. On June 15, 1994, claimant spoke with Zina Stephenson, of respondent's business office, and provided her with a history of back injury that he related to his work duties. Although respondent argues that slight discrepancies exist in the histories provided, we find the discrepancies are insignificant.

Claimant's testimony, coupled with the testimony of his witnesses and the medical records presented, convinces the Appeals Board to conclude that claimant did experience a work-related accident on June 10, 1994, for which he is entitled benefits under the Workers Compensation Act.

(2) At this juncture of the case, the Appeals Board lacks jurisdiction to review the question whether the Administrative Law Judge erred in granting claimant temporary total disability benefits. This ruling comports with many of our earlier decisions.

The Legislature empowered the Appeals Board under K.S.A. 44-534a, to review preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice is given or claim timely made; and (4) whether certain defenses apply.

The issue of temporary total disability benefits propounded by respondent in this case is not an issue that may be reviewed on appeal from a preliminary order under the provisions of K.S.A. 44-534a. In addition, the Appeals Board cannot review the issue under the provisions of K.S.A. 44-551 because the Administrative Law Judge has not exceeded his jurisdiction and authority to award medical treatment and order payment of temporary total disability compensation at Preliminary Hearing. The preliminary hearing

statute, K.S.A. 44-534a, specifically empowers the Administrative Law Judge to make preliminary awards of medical and temporary total compensation.

The respondent argues the Administrative Law Judge exceeded his jurisdiction because he allegedly disregarded the provisions of K.S.A. 44-510c(b)(2). The argument is without merit as the statute does not apply until claimant is released to work with temporary restrictions. Although respondent has attempted to frame the issue in such a manner as to make it appear that the Administrative Law Judge exceeded his authority, the respondent is actually asking us to weigh the evidence the claimant presented in his request for temporary total disability benefits, something we cannot do at this time.

(3) Respondent argues the Administrative Law Judge denied them the right to choose the authorized treating physician. Respondent's argument is without merit. Respondent sent claimant to Dr. Bair on the date of accident. For some reason, Dr. Bair could not treat claimant and referred him to the hospital emergency room where he was examined and referred back to Dr. Bair. At the Preliminary Hearing, the Administrative Law Judge authorized Dr. Bair to continue treatment.

As held in numerous previous cases before us, the Administrative Law Judge is empowered to order medical treatment, including the appointment of an authorized treating physician, when the respondent has failed to do so before preliminary hearing. Respondent bases his argument on the language of K.S.A. 44-510(c)(1), that addresses applications for change of physician. If this were an application for change of physician, respondent's argument would be relevant. However, that is not the issue before us.

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider, the employee may provide same for himself and the employer will be liable for such expenses subject to regulations adopted by the Director. See K.S.A. 44-510(b).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Floyd V. Palmer, dated September 22, 1994, is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick M. Salsbury, Attorney at Law, Topeka, KS
George H. Pearson, III, Attorney at Law, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
George Gomez, Director